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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO: 2014-SC-000389-DG

MIKE SAPP — APPELLANT

vs.

STEPHEN O'DANIEL — APPELLEE

** ** ** ** **

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NUMBER 2012-CA-001961-MR
HONORABLE JUDGES CAPERTON, COMBS AND THOMPSON

** ** ** ** **

BRIEF OF APPELLANT MAJOR MIKE SAPP

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2015, a true and correct copy of the Brief of Appellant Kentucky State Police was served via first-class mail, postage prepaid, on the following persons: Hon. Thomas E. Clay, Meidinger Tower, Suite 1730, 462 South 4th Street, Louisville, KY 40202; Hon. William E. Johnson, 326 West Main Street, Frankfort, KY 40601; Hon. Charles Johnson and Hon. Heidi Engle, 43 S. Main St., Winchester, KY 40391; Hon. Senior Judge Sheila Isaac, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal was not withdrawn by undersigned counsel.

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INTRODUCTION

Stephen O'Daniel sued Kentucky State Police officers in a malicious prosecution action after he was acquitted in a jury trial following his indictment by the Franklin County Grand Jury. In the Franklin Circuit Court, summary judgment was granted in favor of the police officers but that judgment was reversed by the Kentucky Court of Appeals which led to the grant of discretionary review by the Kentucky Supreme Court.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant Mike Sapp requests that the Court hold oral argument in this appeal.

STATEMENT OF POINTS AND AUTHORITIES

Case References:

Statutory references and references to rules:

STATEMENT OF THE CASE

(There were two appeals from Franklin Circuit Court to the Kentucky Court of Appeals in these related cases. In the record on appeal from the Franklin Circuit Court to the Kentucky Supreme Court, both records on appeal have been included. But they were not consolidated. It is necessary for the Appellant, Mike Sapp, to reference parts of the record in both appeals and distinction is made in this Statement of Facts as to which record on appeal is being referenced.)

The Appellee, Stephen O'Daniel (hereinafter O'Daniel), purchased a Corvette automobile which he believed was a 1974 model Corvette. O'Daniel paid $10,500.00 for the car. (Record on Appeal, hereinafter "R.A.", 1st Appeal, p. 374) Soon after purchasing the car, while getting the oil changed, O'Daniel was first informed that the engine didn't match the car. (R.A., 1st Appeal, p. 374) O'Daniel contacted the Kentucky State Police to determine what the car truly was. KSP Detective Bill Riley investigated the matter and determined that the car was in fact a 1975 Corvette and that it had been stolen in 1981 in Chicago. Riley informed O'Daniel that the car would have to be impounded and could not be returned to him. Riley's criminal investigation, in part, was to determine who the rightful owner was. (R.A., 1st Appeal, p. 422)

Riley told O'Daniel that he should just go to Godsey, the man from whom O'Daniel had bought the car, and ask for the money back. O'Daniel said he didn't think Godsey would have the money or would give the money back. So Riley, on his own initiative, called Godsey and explained that he had sold O'Daniel a stolen car and should give the money back. But Riley also called Kelly's Classics, the company in Chicago that had sold the car to Godsey, and informed them of the situation. Someone with Kelly's Classics indicated to Riley that they would be willing to return Godsey's money. (R.A., 1st Appeal, p. 433)

Eventually Riley learned that State Farm Insurance Company had paid the actual owner of the vehicle when the car was reported stolen in 1981 and that State Farm was now the legitimate owner of the car. Riley informed O'Daniel about this. (R.A., 1st Appeal, p. 423) O'Daniel contacted State Farm, apparently by telephone, to notify the company of his interest in the car. In a letter from State Farm to O'Daniel dated April 19, 2006, O'Daniel was notified that State Farm had paid the original owner when the car had been stolen in 1981. (R.A., 2nd Appeal, pp. 118-119) State Farm asserted its legal ownership of the car in that letter and explained that State Farm was responsible for applying for salvage title on the car and would be subject to fines and penalties if the company did not do this. In the letter of April 19, 2006, State Farm told O'Daniel that once the company had obtained the proper title work the vehicle could be sold as salvage and that they would discuss that with him at that time. A second letter was sent from State Farm to O'Daniel on April 24, 2006 which again pointed out that State Farm was in the process of obtaining salvage title for the car. (R.A., 2nd Appeal, p. 181)

As a part of the initial investigation Detective Riley was required to generate a "vehicle inspection report." O'Daniel retained an attorney, Mr. David Russell Marshall, concerning the issues over the car. On April 25, 2006, Mr. Marshall hand delivered a letter to Mr. Luke Morgan, General Counsel for the Justice and Safety Cabinet, in which Marshall asked for permission to inspect the Corvette in order to obtain the vehicle identification number and in order to obtain the police investigation file regarding the automobile. (R.A., 1st Appeal, p. 569) On that same day, April 25, 2006, Luke Morgan called Major Mike Sapp, Kentucky State Police, on Sapp's cell phone and asked Sapp if Morgan could get copies of the inspection report for O'Daniel's lawyer. (Trial Tape Footage (hereinafter TF) 05-17-07/01:25:12)

Sapp sent a memo to Mr. Morgan on April 25, 2006 referencing Detective Riley's report and including a copy. (R.A., 1st Appeal, p. 563) Sapp agreed to comply with that request because a copy of the report had already been supplied to State Farm Insurance Company.

At that time O'Daniel was head of Special Investigations for the Justice and Safety Cabinet. (R.A., 1st Appeal, back of p. 373) Luke Morgan was General Counsel for the Justice and Safety Cabinet. Kentucky State Police was a department under the Justice and Safety Cabinet. After calling the State Police and requesting a copy of this "confidential report" for an employee's lawyer, apparently Luke Morgan turned the report over to either Marshall or O'Daniel because on April 25, 2006, O'Daniel had a copy of the vehicle inspection report.

At some point in time, Morgan decided that the Kentucky State Police should have nothing else to do with the case and that the car should be removed from the State Police impound lot where Detective Riley had kept it since he learned it was stolen. Morgan directed the State Police to contact the Georgetown Police to see if they would take the car and take over the investigation. Then later Morgan contacted the Lexington Police Department himself about taking the car. (Morgan Deposition, P. 34, Lines 8-25, See Appendix E to this Brief) (The Deposition of Luke Morgan is included in the Record transferred by the Franklin Circuit Clerk to the Kentucky Supreme Court but the deposition is not included in those pages that are numbered as part of the record.) Later Morgan contacted the Jessamine County Sheriff's office about taking the car. (Morgan Deposition, P. 35, Lines 3-7, See Appendix E to this Brief)

Then Morgan went with other people to see the Commonwealth's Attorney, Larry Cleveland to discuss the situation involving O'Daniel. (Morgan Deposition, P. 39, Lines 6-18, See Appendix E to this Brief) This may have been the day before the Kentucky State Police met with Mr. Cleveland to discuss the criminal investigation. In any event, Mr. Cleveland eventually

chose to recuse himself from the prosecution and asked for the appointment of a special prosecutor. In his letter to the Attorney General's office requesting the appointment of a special prosecutor, Mr. Cleveland wrote: "My discussions regarding this matter with the individuals involved lead me to believe a conflict exists such as to make the appointment of a special prosecutor appropriate." (R.A., 2nd Appeal, p. 114)

While the efforts to clarify State Farm's claim to the car were ongoing, O'Daniel contacted the Department of Transportation, Motor Vehicle Licensing Division, to determine what he could do to obtain a clear title to the car. (R.A., 1st Appeal, p. 377) He was initially told without equivocation that he was not entitled to apply for title to the car. He was also told that State Farm was applying for title to the car. (R.A., 1st Appeal, back of p. 377) He then went to the County Clerk in his home county of Jessamine County and asked her what he could do to obtain a clear title and a corrected VIN Number. (R.A., 1st Appeal, back of p. 377)

O'Daniel had apparently been told to obtain a "confidential report" which had been prepared by Detective Riley when the automobile was discovered to be stolen. This was the same report Mr. Marshall had requested from Luke Morgan and which Morgan had requested from Major Sapp. O'Daniel obtained a copy of Riley's report, as set out above, and submitted it to the Jessamine County Clerk. An application for title was then transmitted to the Department of Transportation. Annette Holmes in Vehicle Licensing pulled the application submitted by the County Clerk and realized that the VIN Number had been changed. (R.A., 2nd Appeal, p. 487)

During Mr. O'Daniel's criminal trial, Ms. Holmes, an employee of the Motor Vehicle Licensing Department was called to testify. She was asked about contact that she had personally with O'Daniel. She was first asked:

Question: Now what did Mr. O'Daniels want specifically? Was he just seeking information or did he want to do something?

Answer (from Ms. Holmes): "He wanted to know how he could get title to this particular vehicle and what I had told him, the only way he could get it, a title is if he'd work with the insurance company, because they were the legal owner of the vehicle." (TF: 05-14-07/04:03:00)

Question: "And did he call you with the information that he knew an application had already been made or was he asking if one had already been made?"

Answer (from Ms. Holmes): "He was – I don't know if he already knew or not that State Farm – because I had already told him that State Farm was the owner and he knew that – what the procedures were for State Farm to go through to get titles because I had told him that." (TF: 05-14-07/04:06:51)

The questioning of Ms. Holmes at trial continued regarding an attempt by O'Daniel to get a "speed title" through the Jessamine County Clerk's office and she responded:

"I told him we couldn't let it go because they changed the complete VIN and the year model on it."

Question: "Do you recall what his response was to that?"

Answer: "He said that he just thought whoever got titled first would be the owner." (TF: 05-14-07/04:16:27)

O'Daniel had been told by Annette Holmes in the Department of Motor Vehicle Licensing that the proper procedure would be for the insurance company to get salvage title in their name because they were the ones who paid the claim on it. The insurance company could then sell it to O'Daniel or anyone else. (R.A., 2nd Appeal, p. 484)

O'Daniel did not want the vehicle to be labeled as "salvaged" or "branded." He told the personnel in Vehicle Licensing that he was the owner but Annette Holmes told him that all he owned was the VIN Plate and that State Farm owned the vehicle. She told O'Daniel that he needed to "get with the insurance company" if he wanted the vehicle. (R.A., 2nd Appeal, p. 486)

Upon receipt of the application for a "speed title," the Department of Motor Vehicle Licensing contacted KSP to report what appeared to be a fraudulent transaction. Annette Holmes testified at Grand Jury that the application that was submitted to obtain the title for O'Daniel was fraudulent. (R.A., 2nd Appeal, p. 489)

When KSP was contacted by the Department of Transportation, the matter was directed to Major Mike Sapp. Major Sapp assigned the investigation of the apparent fraudulent application for title to Sergeant Gary Martin and Sergeant Bobby Motley. The investigation confirmed that O'Daniel had in fact submitted the title application to the Department of Transportation even after he had been told by DOT that this was not permissible.

Sergeant Gary Martin testified before the Franklin County Grand Jury regarding the title application submitted by O'Daniel. Some of the numbers on the VIN (Vehicle Identification Number) had been changed by the County Clerk. This was apparently done based on information provided by O'Daniel. (R.A., 2nd Appeal, p. 469) In addition, the value of the car was not accurate on the application. O'Daniel had paid $10,500.00 for the car. (R.A., 2nd Appeal, p. 470) There was an NADA Blue Book Value on the car at the time of $16,325.00. (R.A., 2nd Appeal, p. 471) But on the application the value of the car was listed by O'Daniel as $5,625.00 for a car he had paid $10,500.00 for approximately one and a half months before. (R.A., 2nd Appeal, p. 471)

O'Daniel was employed at the time with the Justice Cabinet as Executive Director of Special Investigations. He reported the situation to officials with the Justice Cabinet. Because Kentucky State Police is a department within the Justice Cabinet, certain Justice Cabinet officials determined that there was a conflict for KSP to be handling the investigation. This was shown in a letter from Justice Cabinet Deputy Secretary C. Cleveland Gambill. (R.A., 2nd Appeal, p. 185) But once it was made clear that KSP was conducting a criminal investigation regarding a fraudulent title application, the Deputy Secretary of the Justice and Public Safety Cabinet, Mr. C. Cleveland Gambill, made a clear determination that KSP should continue the investigation through two letters sent to KSP Commissioner Mark Miller (R.A., 2nd Appeal, pp. 186, 187)

After concluding that a fraudulent title application had been filed, KSP approached Larry Cleveland, the Franklin County Commonwealth's Attorney. Cleveland had already met with Luke Morgan and others from the Justice Cabinet when KSP reported the results of their investigation. Mr. Cleveland ultimately decided that he should recuse himself from the case. Mr. Cleveland wrote a letter to the Attorney General's office seeking appointment of a Special Prosecutor. (R.A., 2nd Appeal, p. 114) The Attorney General's office appointed David Stengel (Jefferson County Commonwealth's Attorney) as Special Prosecutor for this matter. (R.A., 2nd Appeal, p. 116)

Mr. Stengel reviewed the evidence compiled by KSP and even called Franklin County Commonwealth's Attorney, Larry Cleveland, to make sure he hadn't missed something before making a decision on the case. (R.A., 2nd Appeal, p. 582) Before making any decision on the case, Mr. Stengel met with KSP officers four or five times and even asked that they do further investigation. (R.A., 2nd Appeal, p. 582) Stengel decided that the evidence was sufficient to submit the case to the Franklin County Grand Jury. (R.A., 2nd Appeal, p. 582) Stengel and his

Assistant Tom Van de Rostyne were the only ones who decided who the Grand Jury witnesses would be. (R.A., 2nd Appeal, p. 582) Stengel made it clear when he was deposed that the KSP Troopers never insisted on going forward with the indictment and that only he, Stengel, made the decision as to whether to present the case to the Grand Jury. (R.A., 2nd Appeal, p. 583) O'Daniel was indicted by the Franklin County Grand Jury for felony violations of KRS 186A.255, KRS 186A.990 (1) and KRS 516.030. The criminal charges eventually proceeded to a jury trial and O'Daniel was found not guilty at trial.

After being acquitted in the criminal trial, O'Daniel filed a malicious prosecution case in Franklin Circuit Court against several of the Kentucky State Police officers involved in the investigation of the application for title to the car he had purchased. The Franklin Circuit Court originally overruled a motion for summary judgment filed by the police officers and an interlocutory appeal was taken to the Court of Appeals which upheld the Circuit Court. But when a subsequent motion for summary judgment was filed by the officers, the Circuit Court granted the motion. O'Daniel appealed that decision to the Court of Appeals which reversed the grant of summary judgment in favor of the police officers and the Supreme Court granted discretionary review.

ARGUMENT

1.) The Appellants in this case are entitled to absolute immunity as to their testimony before the Franklin County Grand Jury and in the Appellee's criminal trial.

A central issue in this action is the extent to which police officers are entitled to immunity from civil liability for the actions they take during their investigations and subsequent testimony they give in prosecuting the crimes they have investigated. The trial court found that the officers in our case sub judice were entitled to immunity from civil liability. The Court of Appeals was in error in their decision reversing the trial court's grant of summary judgment based on immunity.

In *Briscoe v. Lahue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), the United States Supreme Court spoke at length on these issues of immunity and why we have immunity in our justice system. After discussing the foundation of the immunity defenses in common law, the Court went on to explain the rationale for them. "A witness who knows he might be forced to defend a subsequent lawsuit and perhaps pay damages, might be inclined to shade his testimony in favor of a potential plaintiff, to magnify uncertainties and thus deprive the finder of fact of candid, objective, and undistorted evidence," *Briscoe v. Lahue*, *supra*, at 333.

In the *Briscoe v. Lahue* decision, *supra*, the Court cited to *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) in which the Court had reasoned that "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges, advocates

and witnesses can perform their respective functions without harassment or intimidation." *Butz*, *supra*, at 512.

In 2012 the United States Supreme Court took up these issues of official immunity again. The target of a grand jury investigation had brought a §1983 action against an investigator in the district attorney's office in a case reported in *Rehberg v. Paulk*, 132 S. Ct. 1497, 182 L. Ed. 2d 593, 80 USLW 4310 (2012). On three separate occasions Paulk testified against Rehberg at grand jury and obtained indictments. In each case the indictments were ultimately dismissed. Rehberg then brought a §1983 action against Paulk alleging that Paulk falsified grand jury testimony in order to obtain the indictments.

The Court in *Rehberg*, supra, said that §1983 was to be construed in the light of common-law principles. It was therefore necessary, according to the Court, to consult common law to identify those governmental functions that were historically considered as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they were performed with "independence and without fear of consequences." (Citing to *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967))

The Court found that among those governmental functions that were absolutely immune from liability for damages under §1983 was the giving of testimony by witnesses at trial. (*Rehberg v. Paulk*, *supra*, 132 S. Ct. at 1503). Citing back to *Briscoe v. Lahue*, *supra*, the Court said that the immunity of trial witnesses sued under §1983 was broader. In the *Briscoe* decision the Court had held that when a witness was sued because of his testimony, "the claims of the individual must yield to the dictates of public policy." (*Briscoe v. Lahue*, 460 U.S. at 332-333; cited in *Rehberg v. Paulk*, 132 S. Ct. at 1505).

The Court in *Rehburg v. Paulk*, *supra*, went on to say that the factors that justify absolute immunity for trial witnesses apply with equal force to witnesses who testify before the grand jury. Perjured testimony was considered by the Court in the context of whether there was a need to temper the immunity with threat of civil suit for liability to prevent perjurious testimony. But the Court found that there were sufficient safeguards, such as criminal prosecution for perjury, to deter false testimony and that the need for absolute immunity was greater than the rights of one who might be injured by false testimony. (*Rehberg v. Paulk*, 132 S. Ct. at 1505).

Finally, the Court in *Rehberg v. Paulk*, *supra*, found that there was no reason to distinguish between lay witnesses and witnesses who were law enforcement officers. Obviously in terms of §1983 there is a sharp distinction. A law enforcement officer testifying before a grand jury or at a criminal trial is acting under color of law as required under 42 USC §1983. The *Rehberg* Court went back to *Briscoe v. Lahue, supra,* to discuss the differences between witness immunity and the benefit offered to other governmental participants in the legal process. The Court concluded that there was nothing within the §1983 language that should create a "narrow, special category" for police officers which would take away their protection from law suits. (*Rehberg v. Paulk*, 132 S. Ct. at 1505-1506).

The *Rehberg* Court referred again to the *Briscoe v. Lahue, supra,* decision to point out that two arguments for distinguishing law enforcement witnesses had been rejected. It had been argued that absolute immunity was not needed for law enforcement because they would not be as intimidated by the threat of civil suit and that absolute immunity should not apply to peace officers because their testimony was likely to be more damaging than that of a lay witness. The reasons for rejecting these points were that (1) police officers testify much more often than a lay witness would and therefore would be subjected to the threat of civil suit on a more regular basis;

and (2) that a police officer's potential civil liability, if conditioned on exoneration of the accused, could influence decisions on appeal or for collateral relief. For all these reasons, the Court in *Rehberg v. Paulk*, upheld the absolute immunity of law enforcement officers testifying before a grand jury the same as they would have in testifying at trial.

The holding in *Rehberg v. Paulk, supra*, had already been the law in Kentucky since the decision in *Reed v. Isaacs*, 62 S.W.3d 398 (Ky. App. 2000). In that case, a Kentucky State Police detective investigated a murder and testified before the Jessamine County grand jury. The indictment that was issued was eventually dismissed and Reed sued the State Police detective. Citing back to *McClarty v. Bickel*, 159 S.W. 783 (Ky. 1913), the Court of Appeals held that "it is a well settled rule in practically all jurisdictions that the testimony of a witness given in the course of a judicial proceeding is privileged and will not support a cause of action against him."

This was also the holding in *Bryant v. Commonwealth of Kentucky*, 490 F.2d 1273 (6th Cir. 1974). In that case criminal charges had been brought against Bryant and they were dismissed on a directed verdict at the trial of the action. Bryant filed an action in federal court for violation of her civil rights and the District Court granted summary judgment because of the immunity of the public officials who had been sued. The Sixth Circuit Court of Appeals affirmed the judgment of the District Court on appeal. The Court held that: "Under the law of Kentucky, a witness before a grand jury who provides false testimony is liable for criminal action in perjury, but not for any civil action such as malicious prosecution since testimony in a judicial proceeding is privileged as a matter of public policy."

Where case law, both Kentucky and federal, have consistently upheld the valid reasons for maintaining immunity for witnesses, it is error for the Court of Appeals to ignore the precedent and find that the officers in our present case have no immunity with regard to the

testimony they gave in grand jury or at trial. If we strip our police officers of this witness immunity, we will subject them to the unwanted fear of being sued every time they are called upon to give testimony in Court. That will work destruction to our justice system.

For reasons that went unexplained in their opinion, the Court of Appeals held that the decision in *Rehberg v. Paulk, supra*, which said that witnesses before a grand jury and at trial have **absolute immunity** (emphasis added) with regard to the testimony they give, did not effect the prior decision of the Court of Appeals in our present case that the officers are not entitled to "qualified immunity." On page 12 of its decision in our present case, the Court of Appeals writes: "Of import *Rehberg* held that a grand jury witness was entitled to the same immunity as a trial witness in a §1983 action. This comports with well-settled Kentucky law that, 'testimony to the grand jury was privileged, Reed may not maintain a civil action against Isaacs for allegedly lying to the grand jury.'..."

But having said that, the Court goes on to say that the police officers in our present case have no immunity and that the trial court erred in finding that *Rehberg* applied in shielding them from civil damages in the pending case. There is no means by which one can find logic in this decision. The Court goes on to attempt to weave a solution by probing the investigation and making a determination that immunity which comes from testimony does not give immunity for deception that occurred during the investigation that led to the testimony. But there is absolutely no evidence of investigatory deception anywhere in the record, and the trial court does not rely on any aspect of the investigation in its grant of summary judgment.

The Court of Appeals, as has been pointed out in earlier sections above, chooses to ignore the salient facts of this case that show that O'Daniel submitted a fraudulent application for a car title to the Department of Motor Vehicles. To do so is a felony under Kentucky law and it was

for that that he was indicted. Regardless of what else may have happened in the investigation, O'Daniel cannot escape the fact that no charges would have been taken against him had he not falsified information on an application he submitted to a state agency in order to obtain a benefit, that being title to a car, for which he had already been told he had no rights of ownership.

In the present case, the Kentucky State Police did not seek out O'Daniel. He came to them with what he believed to be a stolen car. When Detective Bill Riley checked the car and found the hidden VIN Number, he was able to run it back to a car that had been stolen in Chicago in 1981. At that point pursuant to KRS 186A.320, Riley had an obligation to impound the car and to try to determine who the rightful owner of the car was. When Riley had done that, he discovered that State Farm Insurance Company had paid a claim for the stolen car and that the insurance company thereby had a rightful claim to title to the car. Riley told O'Daniel that.

But Riley, a Kentucky State Police officer, did much more. He advised O'Daniel to try to get his money back out of the man who had sold O'Daniel the car. When O'Daniel said he didn't think he would have the money or would want to pay him back, Riley took it upon himself to call the seller and to advise him of the situation and explain that he should give O'Daniel his money back because the car had been stolen. Riley went even further. He called Kelly's Classics in Illinois that had sold the car to Godsey and told them they had sold a stolen car and advised them that they should repay Godsey. Someone from Kelly's Classics indicated that they would be willing to refund the money. (R.A., 1st Appeal, p. 433)

All of this showed an absolute willingness on the part of KSP to attempt to assist O'Daniel with getting his money back for the stolen car. Nothing in this scenario shows any malice toward him or would indicate in any way that KSP had any animosity toward O'Daniel.

After Riley completed his stolen car report, Kentucky State Police did nothing else about this matter until a call was received from Annette Holmes with Motor Vehicle Licensing. Ms. Holmes informed KSP (pursuant to KRS 186A.255) of what she believed to be a fraudulent title application that had been submitted by Mr. O'Daniel. When the report was received, Major Mike Sapp, was tasked with having the matter investigated. Major Sapp assigned Sgt. Mike Martin and Sgt. Bobby Motley to investigate what Ms. Holmes had reported. Both Sgt. Martin and Sgt. Motley were involved in the investigation. Sgt. Martin and Annette Homes testified at grand jury. Sgt. Motley did not testify at grand jury. Major Sapp did not testify at grand jury.

But Major Sapp was called to testify at trial. Part of the claim against him in this action rests upon his testimony at trial and his supervisory role in the investigation that led to the indictment of O'Daniel. But to the extent that O'Daniel's claims in the case sub judice against Sapp depend on Sapp's testimony at trial, they are barred for all the reasons set out above. As a police officer, Major Sapp is immune from being sued because of testimony he gave at trial.

In addition to the fact that Major Sapp as a police officer has absolute immunity under the *Rehberg* doctrine for any testimony he gave at trial, the Court must understand that Major Sapp did not appear as a witness for the prosecution in the criminal trial. He was not subpoenaed to appear for the Commonwealth. He was subpoenaed to court by the defense. It is completely absurd for the defense to call a police officer as a witness, under subpoena, require him to testify before the court and then charge him with malicious prosecution for the testimony which the Appellee himself elicited at trial.

2.) The Court of Appeals is in error in failing to recognize that the Appellee cannot meet the elements of a malicious prosecution case because the first two elements of a malicious prosecution case under Kentucky law are the institution or continuation of original judicial proceedings at the instance of the "plaintiff."

Kentucky law is clear that successful prosecution of a malicious prosecution case requires the proponent to meet six elements: **(1) the initiation or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance, of the plaintiff**, (emphasis added) (3) the termination of such proceedings in the defendant's favor; (4) malice in the institution of the proceeding; (5) want or lack of probable cause for the proceeding; and (6) the suffering of damages as a result of the proceeding. *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).

The trial court in our present case accurately recognized that there are only three means by which a criminal charge can be instituted under Kentucky law, i.e. (1) an arrest can be made by a sworn peace officer; (2) a criminal complaint can be filed with the county attorney in the county where the crime was committed; or (3) an indictment can be returned by the grand jury.

In our present case, if Major Sapp, Sgt. Martin or Sgt. Motley had probable cause to believe that O'Daniel had committed a felony by filing a fraudulent application to title a motor vehicle, they could have arrested him and lodged him in jail. The charge for which he was ultimately indicted was a felony. They did not arrest him.

Alternatively, they could have taken the information they had compiled through their investigation to the Franklin County Attorney and applied for an arrest warrant. If the warrant had been granted, they would have arrested O'Daniel. But the Appellants in this case did not choose either of these first two methods to pursue criminal charges against O'Daniel.

Instead they chose the final process. They went to the Franklin County Commonwealth's Attorney who is responsible for presenting criminal matters to the grand jury. When they were talking with Larry Cleveland, they learned that the day before Cleveland had spoken with Luke Morgan, who Major Sapp knew had intervened to obtain the "confidential report" which O'Daniel needed to apply for title for the car. Luke Morgan was also involved in the process under which Kentucky State Police had been ordered to remove the car from their possession and transfer it to another police agency and assign the criminal investigation to another agency. At that point Larry Cleveland decided that he had a conflict in prosecuting the case and he applied to the Attorney General's office to have a Special Prosecutor appointed.

Kentucky has a unified prosecutors' system. Each elected prosecutor is charged with responsibilities for prosecuting crimes in the jurisdiction from which he or she is elected. But there are situations where conflicts may arise or a prosecutor may need assistance outside his or her own office. For that reason, all prosecutors in the state may be called on by the Attorney General to prosecute crimes anywhere in the state. But in order for that to happen, the local prosecutor must request the appointment of a Special Prosecutor. Without a determination by the local prosecutor that recusal is required and that someone else should prosecute the case, the Attorney General's office will not take that step. Mr. Cleveland was the only person who could make the decision that he had a conflict and request a Special Prosecutor and that is what he did.

Only the Special Prosecutor made the decision to present the charges to the grand jury. This was the testimony of David Stengel, the Jefferson County Commonwealth's Attorney who was appointed as Special Prosecutor. He met with the State Police several times, reviewed everything they had done and asked them to investigate further. He even called Larry Cleveland to make sure there wasn't anything that was being missed. Stengel testified in deposition that the

officers never insisted on bringing the case to the grand jury and that that decision was his alone. He said that only he and his Assistant Commonwealth Attorney made the decision as to who would be called as witnesses at the grand jury. (R.A. 2nd Appeal, p. 582)

Another factor that should be considered here is that the underlying criminal case did not begin with an independent investigation by the Kentucky State Police. After Detective Riley had concluded his work and determined that the car had been stolen in Chicago and that State Farm Insurance Company had paid for it, Kentucky State Police was done with their work. They had impounded the car and would not release it until they had proper authority to do so pursuant to KRS 186A.320. But there was no further investigation to do at that time. Higher echelon representatives of the Justice Cabinet, where O'Daniel was an employee, intervened and ordered Kentucky State Police to remove the car and to have it moved to a tow lot in O'Daniel's home county (contrary to law). But there was no further investigation as far as KSP was concerned.

The next investigation began when the Kentucky State Police got a call from Annette Holmes. Ms. Holmes worked at the Motor Licensing Department and had been contacted by O'Daniel about having his "speed title" released. She pulled the application and, after reviewing it, she contacted the County Clerk in Jessamine County where the application had been filed. Ms. Holmes learned that several numbers on the VIN had been changed and that the model year on the application had been changed. Ms. Holmes believed that this was a fraudulent application and she contacted the Kentucky State Police (pursuant to KRS 186A.255) to report what she believed to be a crime.

The Kentucky State Police are required by law to investigate crimes that are reported to them. That is what Major Sapp, Sgt. Martin and Sgt. Motley did in this matter. They did what they are sworn to do. They did not initiate this process. They did their duty and the trial court

recognized that they did not "initiate" the proceedings, which is a required element of malicious prosecution under the holding of *Raine v. Drasin, supra*. For these reasons, the Court of Appeals was in error in failing to uphold the summary judgment granted by the trial court.

In considering the ruling of the trial court, the Court of Appeals completely ignored the element of "initiation" of the proceeding. On Page 15 of the Court of Appeals opinion the Court begins a paragraph by saying: "At issue is whether the officers instituted or continued the original judicial proceedings when a prosecutor obtained an indictment from a grand jury." But that is the extent to which the Court discusses the "initiation" of the proceeding. In the immediate footnote that follows the statement quoted above the Court jumps to the "probable cause" element of the malicious prosecution case and never returns to how the case was initiated.

After the very next sentence of the opinion, in a lengthy footnote, the opinion turns to a discussion of criminal prosecution which hinges on the fact that for a plaintiff to prevail he must show that there was a lack of probable cause. So again the Court of Appeals fails to address the role of the officers in our case sub judice in "initiating" the criminal case against O'Daniel.

The closest the Court comes to addressing this issue is when they cite to *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010), to the point that "very little case law [exists] discussing precisely what role an investigating officer must play in initiating a prosecution such that liability for malicious prosecution is warranted, but...the fact that they did not make the decision to prosecute does not per se absolve them from liability." The decision in *Sykes, supra*, is a discussion of federal malicious prosecution and not malicious prosecution under Kentucky law.

Quoting again from *Sykes, supra*, the Court of Appeals seemed to adopt the position that if the "defendant made, influenced, or participated in the decision to prosecute" he is subject to a malicious prosecution suit. That surely cannot be the law. In every single criminal case that is

taken the police officer makes, influences or participates in decisions to prosecute the person charged with a crime. If we are to open the police to civil damages each time a criminal charge is dismissed simply because they were involved in charging the person, there will be such a chilling effect on our justice system as to irrevocably change how police do their jobs.

In *Broaddus v. Campbell*, 911 S.W.2d 281 (Ky. Ct. App. 1995), the Court said: "Actions for malicious prosecution have generally been disfavored due to the chilling effect on those considering reporting a crime." (Citing to *Reid v. True*, 302 S.W.2d 846 (1957)) This must be especially recognized with regard to our police forces. Every day in multiple incidents, the police are involved in the investigation and prosecution of criminal acts. We cannot subject them to being sued because they investigate crimes that are reported to them or when they reveal their investigations to prosecutors or grand juries.

What the Court must remember is that there was very solid evidence here that O'Daniel submitted an application for a car title that contained fraudulent information and representing that he was the true owner of the car,. Many of the numbers on the VIN had been changed. The model year had been changed. The value he had paid for the car had been changed significantly. These were the material facts that were presented to the grand jury, not at the initiation of the Kentucky State Police, but at the initiation of Ms. Annette Homes with the Motor Vehicle Licensing Department.

This evidence was presented to an elected prosecutor who had been appointed by the Attorney General as a special prosecutor. Together with his Assistant, the Commonwealth Attorney made a decision that the evidence was sufficient to submit to a grand jury. The grand jury heard the relevant facts and found that an indictment should issue. The police did not

initiate the proceeding. But they did their job as sworn officers and they cannot now be subjected to civil damages for so doing.

What O'Daniel alleges in the case sub judice is that Sgt. Martin lied to the grand jury about how many times Eva McDaniel was interviewed. But that was not substantive. He was asked a direct question as to whether he, Sgt. Martin, had gone back and interviewed Ms. McDaniel and he answered that she was interviewed twice. O'Daniel has made much of the fact that she was in fact interviewed three times, once by Sgt. Motley. But Sgt. Martin's answer that she was interviewed twice was responsive to a question about his own actions, not those of Sgt. Motley. And none of that colloquy before the grand jury had anything to do with whether or not a fraudulent application had been filed for a title.

3.) The Appellee's case for malicious prosecution must fail because he was indicted by the grand jury which is prima facie proof of probable cause for the criminal charges which were brought against him. In addition, at the criminal trial, the trial court overruled a motion for directed verdict at the close of the Commonwealth's case and again at the close of all evidence. The refusal to grant a directed verdict is a finding of probable cause by the trial court.

In our case sub judice, O'Daniel, did not file a civil rights action under 42 USC §1983. Instead he chose to pursue an action for malicious prosecution. As stated above, the elements for a malicious prosecution action are set out in *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981): (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of the

proceeding, (5) **want or lack of probable cause for the proceeding**, (emphasis added) and (6) the suffering of damage as a result of the proceeding.

In *Davis v. McKinney*, 422 Fed. Appx. 442 (6th Cir. 2011), the Sixth Circuit Court of Appeals held that to prevail on a claim for malicious prosecution under both federal and state claims, a plaintiff must establish a lack of probable cause. Citing to *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006) and *Cook v. McPherson*, 273 Fed. Appx. 421 (6th Cir. 2008), the Court found that under federal law the issuance of an indictment by a grand jury conclusively determined the existence of probable cause. Citing to *Davidson v. Castner-Knott Dry Goods Co. Inc.*, 202 S.W.3d 597 (Ky. Ct. App. 2006) and *Conder v. Morrison*, 121 S.W.2d 930 (Ky. 1938), the Court said that under Kentucky law the return of an indictment by a grand jury creates a rebuttable presumption that probable cause existed.

In *Davis v. McKinney*, *supra*, the Court said that Davis had proffered no evidence that would tend to overcome the presumption created by the indictment. They specifically pointed to the fact that there was no evidence of false testimony before the grand jury. In our instant case, the Appellee has alleged that Sgt. Martin lied to the grand jury in that he told the grand jury that there were two interviews of the Jessamine County Clerk, Eva McDaniels. But in his grand jury testimony he was asked the following question by the Commonwealth Attorney and gave the following answer:

Cwth Atty: In fact, you went back later to Mrs. McDaniel and interviewed her with regards to this transaction?

Witness: She was interviewed twice, that's correct. They're both recorded.

(R.A., 2nd Appeal, p. 471)

Sgt. Martin was asked directly if he went back and interviewed Mrs. McDaniel and his answer was that she was interviewed twice. He was not asked about Sgt. Motley interviewing her and his answer had nothing to do with whether or not another officer had also interviewed her. It was in response to a direct question about his personal interaction with Mrs. McDaniel.

Later in his testimony, Martin was asked about the pending civil suit in Jessamine Circuit Court regarding title to the car and he acknowledged that there was a suit and he said that to the best of his knowledge the Department of Transportation was appealing the judgment to issue title to O'Daniel. He did not state it as a fact but said that it was to the best of his knowledge. His knowledge turned out to be wrong, but that does not indicate that he was lying. He had told the grand jury that a Judge had ordered title be transferred to O'Daniel, which was a true statement.

The grand jury also heard from Ms. Annette Holmes, an employee of the Motor Licensing Department who testified that O'Daniel had submitted an application for a "speed title" that was for a completely different vehicle. The VIN number on the application had been changed and the model year on the vehicle had been changed. She also testified that she had already told O'Daniel that he could not apply for the title because State Farm owned the car. That was the critical testimony before the grand jury.

At the time O'Daniel applied for the title, he knew the vehicle had been stolen, he knew that State Farm had paid the original owner from whom it was stolen and he knew State Farm was making a claim to the vehicle and intended to apply for title. All of that was explained to the grand jury. O'Daniel had been told by Detective Riley, Annette Holmes and State Farm Insurance that he could not directly apply for title himself. Despite knowing this, he signed an application for title on which the VIN had been changed, the model year had been changed and

the value was vastly different than what he had paid. There was clearly substantial evidence for a grand jury to indict him, thereby creating probable cause for the criminal charges.

In its opinion, the Court of Appeals does not really speak to the issue of probable cause except to say that Kentucky case law is to the point that a grand jury indictment creates a rebuttable presumption of probable cause. (Citing to *Conder v. Morrison*, 121 S.W.2d 930 (1938); *Schott v. Indiana Nat. Life Insurance Co.*, 169 S.W. 1023 (1914); *Garrard v. Willet*, 27 Ky. 628 (4 J.J. Marsh), (1830); and *Davidson v. Castner-Knott Dry Goods Co. Inc.*, 202 S.W.3d 597 (Ky. Ct. App. 2006))

It should be noted that not only did the grand jury return an indictment based on clear evidence presented to them that false information had been submitted on a title application, but when the case was presented to the trial court and a motion for directed verdict was made at the close of the Commonwealth's case and again at the close of all evidence, the trial judge overruled the motions for a directed verdict and allowed the case to go to the jury. The decisions of the trial judge, overruling motions for directed verdict, are findings of probable cause.

When a criminal defendant makes a motion for a directed verdict, the trial court is doing much more than determining whether or not there is probable cause, but it has to be considered as a finding of probable cause for the purposes of defeating an action for malicious prosecution. In *Biederman v. Commonwealth*, 434 S.W.3d 40 (Ky. 2014), the Kentucky Supreme Court said that the test for a directed verdict on appellate review is "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then [is] the defendant…entitled to a directed verdict of acquittal. (Citing to *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991))

The Court went on in *Biederman, supra,* to say that on a motion for directed verdict, the trial court must take the evidence in a light most favorable to the Commonwealth and assume

that all the evidence presented by the Commonwealth was true, leaving questions of weight and credibility of witnesses to the jury. (Citing to *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998))

Under the rule in *Biederman, supra*, to survive a motion for directed verdict the Commonwealth must have presented evidence of substance, more than a scintilla of evidence. (Citing to *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983))

For all the reasons set out in the cases above, when the Franklin Circuit Court overruled O'Daniel's motions for a directed verdict and allowed the criminal charges to go to the jury, it was doing much more than finding probable cause. Perforce, the Court was finding that a reasonable jury could find the defendant guilty. This was certainly more than a finding that there was probable cause for the charges to have been brought.

As the discussion concerns probable cause as an element of the tort of malicious prosecution, it is critical to consider what "probable cause" is under our law. This is a legal topic of long standing and considerable debate. In *Patton v. Commonwealth*, 430 S.W.3d 902 (Ky. Ct. App. 2014) consideration was once more given to what constitutes "probable cause." The Court in the *Patton* decision cited to *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004), where the Kentucky Supreme Court held that probable cause is a "flexible common-sense standard." The Court in *Williams, supra*, went on to say: "To determine whether an officer had probable cause to arrest an individual we examine the events leading up to the arrest and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable officer, amount to probable cause." (Citing to *Maryland v. Pringle*, 540 U.S. 366, 377, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003))

The Court in *Williams v. Commonwealth, supra*, went much farther in quoting from *Maryland v. Pringle, supra*, to elucidate the standards for probable cause:

> **"The long prevailing standards of probable cause protect 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime' while giving 'fair leeway for enforcing the law in the community's protection.' *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). On many occasions we have reiterated that the probable cause standard is a 'practical non-technical concept' that deals with the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (*quoting Brinegar, supra*, at 175-176, 69 S. Ct. 1302).**
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> **"The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. See *ibid Brinegar*, 338 U.S. at 175, 69 S. Ct. 1302. We have stated however that [t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt and that the belief of guilt must be particularized with respect to the person to be searched or seized. *Ybarra v. Illinois*, 444 U.S 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).**
>
> **"As early as *Locke v. United States*, 11 U.S. 339, (7 Cranch 339), 348, 3 L. Ed 364 (1813) Chief Justice Marshall observed in a closely related context '[T]he term "probable cause" according to its usual acceptation, means less than evidence which would justify condemnation...it imports a seizure made under circumstances which warrant suspicion.' Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision. [Citing to *Illinois v. Gates, supra*, 462 U.S. 213, 235, 103 S. Ct. 2317.**

In our present case Annette Holmes with the Motor Licensing Department reviewed an application for a car title which O'Daniel had submitted. She then called the County Clerk who had filed it. Holmes learned from her review that several numbers on the VIN had been changed and that the model year on the application had been changed. She thought this was a fraudulent application and she contacted the Kentucky State Police pursuant to KRS 186A.255. The State Police investigated the matter and they believed a crime had been committed. The State Police presented their case to an elected prosecutor who had been appointed as a special prosecutor by

the Attorney General. The special prosecutor and his Assistant both reviewed the case, required the State Police to do some further investigation and then the prosecutors decided that the case should be presented to the grand jury.

The evidence which the grand jury was given to consider was that O'Daniel had been told by the Motor Licensing Department that he could not apply for a title for this car; that he submitted an application that had numbers on the VIN that were false for that car; that the model year on the application was false; and that the value of the car on the application was not the value O'Daniel had paid for the car just a few weeks prior. The grand jury was also told that through a civil suit in Jessamine Circuit Court that a Judge had ordered that O'Daniel be given a title to the car. Sgt. Martin testified that to the best of his knowledge the Motor Vehicle Department was appealing the court decision, which proved not to be the case. Based on all this testimony, the grand jury indicted O'Daniel.

Any reasonable person in the position of Major Mike Sapp, Sgt. Martin or Sgt. Motley, based on the facts that had been given to them, would have had reason to believe that there was probable cause that O'Daniel had submitted a fraudulent application for a title to the car. This is a felony under Kentucky law. They also had the advice of two prosecutors who reviewed everything the police officers had done and advised them that there was enough evidence to present the case to a grand jury.

4.) The Appellant, Major Mike Sapp, is entitled to qualified immunity with regard to the claims of the Appellee which immunity would require that the case against Major Sapp be dismissed.

In *Barnes v. Wright*, the Sixth Circuit Court of Appeals took up the issue of qualified immunity in a Kentucky case, (449 F.3d 709 (6th Cir. 2006). That case involved a claim of a civil rights violation based on malicious prosecution and our present case is one of malicious prosecution, so the issues involving qualified immunity are the same. The Court in *Barnes v. Wright, supra,* cited to *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), which quoted from *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) to the point that **"government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."** (emphasis added)

In *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), the U.S. Supreme Court made it clear that qualified immunity was immunity from suit and not just a defense to liability. This is the reason that interlocutory appeals are permitted from a denial of summary judgment with regard to qualified immunity. In *Pearson, supra*, officers had made a warrantless entry and search of a residence. After the ensuing criminal conviction was vacated, the defendant in the criminal action filed a §1983 action against the officers. Summary judgment was granted in District Court but that was overturned by the Tenth Circuit Court of Appeals. The U.S. Supreme Court granted certiorari and in its decision the Court said:

> **"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified**

> **immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' *Groh v. Ramirez,* 540 U.S. 551, 567 (2004) ...Because qualified immunity is 'an immunity from suit rather than a mere defense to liability ...it is effectively lost if a case is erroneously permitted to go to trial.' *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).**" (emphasis added)

In *Pearson, supra*, the right against warrantless entry and search of the home was clearly protected by the Fourth Amendment and was therefore a recognized constitutional right. In our present case, we have police officers who received a complaint from an official in Motor Vehicle Licensing and investigated allegations that O'Daniel had fraudulently submitted an application for title to a car. After presenting their investigation to the appointed prosecutor, that prosecutor made the decision to present the case to a grand jury. There is no constitutional right that has been violated here. There was no malicious prosecution. The officers simply did their job. If somehow they had been mistaken, which they were not, the holding in *Pearson, supra*, is that they are entitled to qualified immunity which is a complete bar to the action.

The Court in *Pearson, supra*, went on to say that in qualified immunity cases the enquiry should turn on "the objective legal reasonableness of the action, assessed in the light of the legal rules that were clearly established at the time it was taken." (Citing to *Wilson v. Layne,* 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)) Again applying that holding to our fact situation, when the officers in our instant case found that O'Daniel had submitted an application with changed VIN numbers, a changed model year and a changed value and when the officers presented it to the prosecutor who made the decision to present it to the grand jury, the actions of the officers have to be perceived as reasonable in light of all legal rules.

In *Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994)*, our highest court said that the doctrine of qualified immunity shields public officials from damage claims unless their conduct was unreasonable in the light of clearly established law. But the court went further to discuss the purpose of qualified immunity and said: **"The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'"** (emphasis added) *Elder v Holloway, supra,* (citing to *Harlow v. Fitzgerald, supra*).

In *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991), the United States Supreme Court held that even under circumstances where a law enforcement officer is mistaken as to probable cause, if the belief is reasonable, that officer is entitled to immunity. In that case a Secret Service agent had been sued following an arrest he had made. The Court said that qualified immunity shielded the agent if a reasonable officer could have believed that the arrest would have been lawful in the light of clearly established law and the information which the agent possessed. The question of whether a reasonable officer could have believed that there was probable cause is one for the court and not for the trier of fact when a motion for summary judgment is filed and immunity should ordinarily be decided long before a case comes to trial.

Kentucky law prohibits making false statements on an official document in order to receive something in return. Here, VIN numbers were changed, the model year of the car was changed and the value paid for the car was changed so that O'Daniel could receive "clear" title to the car. He told Ms. Annette Holmes that he thought who ever got title first was the owner even though he had previously been told he had no right to title to the car. Under any determination of probable cause the police officers involved had reason to believe that a crime had been committed by O'Daniel and they are entitled to qualified immunity.

Recent Kentucky cases have taken up the issue of what is required for a party to prevail in an action against a state agent in a "personal capacity" suit. In *Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014), the Kentucky Supreme Court held that the right to recover hinges on the difference between "ministerial acts" and "discretionary acts."

In the Court's analysis of the Court of Appeals decision in *Gaither, supra*, the Court wrote specifically about what had happened with the use of Gaither in testifying before the grand jury:

> **"Specifically we agree that the decision to have Gaither testify before the grand juries in Taylor and Marion Counties was a discretionary matter. In hindsight, it may be easy to see that an alternative method could have been used to present his testimony while preserving his anonymity, but ultimately we recognize that deciding how to prepare and present a case in any tribunal, including a grand jury, requires the exercise of prosecutorial discretion and judgment. It is not a ministerial act, and the Court of Appeals conclusion on that point was correct."** (emphasis added)

While the Court may have been speaking specifically there about prosecutorial discretion, the same has to be said for the preparation and presentation of a case in any tribunal by police officers. Which witnesses to interview; what questions to ask the witnesses who are chosen; and what evidence is important are some of the elements of a criminal investigation. Just as a prosecutor must use his discretion in deciding what questions to ask a witness in trial or before a grand jury, a police officer must make determinations as to what is truly important in a case and what is not. All of this is discretionary and all of this is covered by qualified immunity.

The Court in *Gaither, supra,* said that a "ministerial act" had often been defined as one requiring only obedience to the orders of others or when an officer's duty was absolute, certain and imperative, involving merely the execution of a specific act arising from fixed and designated facts. (Citing to *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)) By contrast, a discretionary act involves the exercise of discretion and judgment or personal deliberation,

decision and judgment. They went on to quote from *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010) to say that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end. In *Haney v. Monsky*, *supra*, the Kentucky Supreme Court said that when a government official is sued in his individual capacity he enjoys qualified immunity affording protection from damages liability for good faith judgment calls made in a legally uncertain environment.

In actions involving qualified immunity, the plaintiff must first identify a clearly established right which is alleged to have been violated and also establish that a reasonable officer in the defendant's position should have known that his conduct violated the established right. This was the holding of *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). In addition the ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991) as cited in *Gardenhire v. Schubert*, 205 F.3d 303, (6th Cir. 2000).

In the original Court of Appeals decision in our present case (rendered May 20, 2011) the Court said that *Yanero, supra,* limited qualified immunity to "claims of negligence." This part of the original decision was adopted by the Court in the second Court of Appeals decision which is now under discretionary review here. But that cannot be the actual holding of *Yanero*. It makes no sense in the discussion of immunity for police officers to say that qualified immunity only applies to negligence actions. In rare cases, such as when an officer has an automobile wreck or when an officer causes a person to slip and fall, we might have what truly can be called negligence. But this is a rarity for police actions.

Almost all incidents about which police officers get sued involve intentional acts on their part, not negligent acts. They intentionally arrested someone. They intentionally searched someone. They intentionally used a taser on someone or they intentionally shot someone. These are not negligence actions. The analysis is not whether the officer acted negligently. Rather it is whether under the circumstances that existed at the time the officer took a discretionary action, a reasonable officer would have believed that he was justified in the action he took and that he was not violating a clearly recognized right of the person who is now suing him.

In almost all the cases cited above in this section, where qualified immunity was applied, police officers were shielded from civil damages after they had taken some intentional and purposeful act. Few of the cases speak of "negligence." In *Barnes v. Wright, supra*, the officers were sued for "falsely arresting and maliciously securing ... prosecution...." In *Pearson v. Callahan, supra*, the officers intentionally entered and intentionally searched a residence. In *Dickerson v. McClellan, supra*, the officer intentionally fired his gun multiple times at a man he thought had fired on him, killing the man. In *Harlow v. Fitzgerald, supra*, the case involved an allegation of unlawful discharge from the Air Force. In *Elder v. Holloway, supra*, suit was brought for wrongful arrest under the Fourth Amendment when a man who had a warrant for his arrest in one state was arrested in another state where there was no warrant. In *Hunter v. Bryant, supra,* a man was arrested by Secret Service agents after he admitted writing a letter threatening to kill the President. In *Gaither*, *supra*, Kentucky State Police officers sent a confidential informant back into a dangerous situation after his identity had been revealed when he testified before the grand jury. The only two cases where negligence could have been considered as being involved were the cases of *Yanero* where a baseball coach failed to require a player to put

on a helmet during batting practice and *Haney v. Monsky*, *supra*, where a child was injured while blindfolded during a camp activity.

Again, when we apply the law to our present case, after receiving a report from Ms. Holmes, the Kentucky State Police carried out an investigation. Major Sapp's role in this was to assign the investigation to certain personnel. That is by its very nature discretionary. Making determinations as to whether the evidence warranted contacting the prosecutor is discretionary. Determining which witnesses were to be interviewed and what questions were to be asked (although those were not Major Sapp's functions in this case) were completely discretionary. There is no aspect of this investigation or its presentation to the grand jury that can be considered to be ministerial. For all those reasons, within the definitions of *Gaither, Yanero*, and *Haney v. Monskey*, only discretionary acts were involved for which qualified immunity bars an action against the Kentucky State Police officers individually.

For all these reasons, Major Sapp, as well as the other Kentucky State Police officers are entitled to qualified immunity in this case

5.) The Appellee bases his claim against Major Sapp, in part, on certain documents being withheld in discovery. Kentucky Rule of Criminal Procedure 7.24 does not require the production of police notes and therefore the documents, even if they had been withheld, cannot form the basis of a civil claim for damages. Also, the Appellee's claim of being denied exculpatory evidence fails because he was acquitted of the criminal charges.

The Appellee has argued that somehow Major Sapp is liable in damages for withholding certain information requested in pre-trial discovery in the criminal case. What is at issue is a

notebook Major Sapp kept during the investigation. The Appellee had requested the State Police to turn over all documents related to the case and Major Sapp had not turned over the notebook until the night before he testified at trial. He then gave it to the prosecutor who turned it over to the defense attorney on the day Major Sapp testified. Major Sapp was subpoenaed by the defense attorney, who had the notebook and used in questioning his own witness.

The Appellee claims that the withheld information was somehow exculpatory. There is an implied claim that there was something nefarious about the fact that the State Police would not turn over this information after being requested to do so and after being served with a subpoena demanding production of all documents.

In *McPherson v. Com.*, 360 S.W.3d 207 (Ky. 2012), a St. Louis homicide detective had interviewed a party after she was arrested in Missouri, relative to matters that led to a criminal case in Kentucky. There was a suppression hearing and Detective Harrington testified that he had made notes, but that he had destroyed the notes before he testified because he had incorporated them in his draft report. The report was made available to the defendant by the prosecution when it was complete. McPherson argued that the notes which had been destroyed exculpated him. The Kentucky Supreme Court considered the issue of exculpatory evidence and turned to the United States Supreme Court decisions for guidance.

In *Illinois v. Fisher*, 540 U.S. 544, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004), the Supreme Court summarized some of its holdings with respect to a defendant's due process rights to have exculpatory evidence in the hands of the state disclosed or preserved. The Court in that case said:

> **"We have held in [*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld...[B]y**

contrast we recognized in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), that the Due Process Clause 'requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said that that it could have been subjected to tests, the results of which might have exonerated the defendant'...We concluded that the failure to preserve this 'potentially useful evidence' does not violate due process 'unless a criminal defendant can show bad faith on the part of the police." *Illinois v. Fisher*, 540 U.S. at 547-548.

The Kentucky Supreme Court in *McPherson, supra,* went on to say that the destruction of the detective's notes in that case, once they had been incorporated in his draft report appears to have been more a matter of routine housekeeping than the suppression of evidence. The Court then referred to Kentucky Rule of Criminal Procedure 7.24 which requires the discovery of an official police report but specifically excludes his notes from discovery. The court said that the rule seemed to contemplate this very sort of "housekeeping." The Court also cited to *Killian v. United States*, 368 U.S. 231, 82 S. Ct. 302 (1961) in which an FBI agent had destroyed notes from witness interviews after he had prepared an investigatory report. The Supreme Court of the United States found that there was no due process violation in this instance.

In *Cavender v. Miller*, 984 S.W.2d 848 (Ky. 1998), the Kentucky Supreme Court held that RCr 7.24 specifically exempts the notes of an investigating police officer from production. Where the defendant had been given a copy of the officer's complete statement, the Court held that he was not entitled to the mental impressions or ideas of the officer. (Citing to *Pankey v. Commonwealth*, 485 S.W.2d 513 (1972) and *Moore v. Commonwealth*, 634 S.W.2d 426 (1982))

Under a motion to compel, the trial court could not have required the Commonwealth to produce Major Sapp's notebook. It was his handwritten notes and was specifically excluded under RCr 7.24. If Major Sapp had destroyed the notes, there would have been no violation of discovery rules for doing so. But Major Sapp did not do that. He produced the notes and they were made available to the defense at trial and he was questioned about them. It is absurd for

O'Daniel to now use the failure to produce documents, which are not required to be produced, but which were produced, as a hook upon which he hangs his malicious prosecution case.

Essentially one claim of the Appellee in the pending civil action is that he was somehow damaged because he was denied exculpatory evidence contained within Major Sapp's notebook. He was not denied the notebook as it was produced and was used at trial. There is no proof whatsoever that the notebook contained any exculpatory evidence. And the notebook was not discoverable under RCr 7.24. But those issues are not relevant here because the civil claims of the Appellee are barred because he was acquitted at trial.

In *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007), the Court held that under the *Brady* doctrine evidence is only material if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. This exercise seems to have become the dog chasing its proverbial tail in that the material was in fact disclosed even though not discoverable. But even had it been withheld, the Appellee cannot complain because he was acquitted.

In *Robertson v. Lucas*, 753 F.3d 606 (6th Cir. 2014), the Court of Appeals considered a civil action where it was alleged that police officers were liable for false arrest, malicious prosecution and manufacturing false evidence, much like in our case sub judice. There were also allegations of *Brady* violations for failure to disclose exculpatory evidence. The Court construed a constitutional tort claim on the basis of *Brady v. Maryland* as being either a §1983 action or a *Bivens* claim and as such is entitled to a qualified immunity defense.

But the Court went further to analyze the *Brady* issues. First of all the Court said that evidence is material and must be disclosed under *Brady* when there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed.

Again, in our current situation, the evidence was disclosed and was used at trial. But where the defendant was acquitted he cannot now complain that his rights were violated under *Brady*.

The Court also addressed the situation where evidence is disclosed at trial and said that in this situation no *Brady* violation occurs. So in our case sub judice, even though the Appellee would have liked to have had Major Sapp's notebook earlier, when he got it during the trial and had it for use in questioning Major Sapp as a witness, he cannot now complain of a *Brady* violation. For all these reasons, the Appellee must fail in his claim against Major Sapp for his failure to surrender his notebook before trial.

CONCLUSION:

For all the reasons set out above, the Court of Appeals was in error in reversing the trial court's order of summary judgment. The Appellant, Mike Sapp, respectfully respects that this Honorable Court reverse the decision of the Court of Appeals and re-instate the summary judgment dismissing all claims of the Appellee, Stephen O'Daniel.

Respectfully submitted,

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